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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 332.

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JOHN H. JACKSON,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER, SOUTHERN RAILWAY COMPANY.

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I.

Attention is invited to the recent case of *Justice v. Pennsylvania Railroad Company*, 191 N.E.2d 72 (Ill. 1963), and more particularly to the following language:

> "Under the Federal Employers' Liability Act the issue of negligence as well as plaintiff's contributory negligence is one for the jury to determine. . . . Only in the clearest case, where the hypothesis of contributory fault is not fairly admissible, does the question become one of law for the termination by the court.

> . . . Otherwise it is the very essence of the jury's function to select from among conflicting inferences and conclusions that which it considers most reasonable. It can choose any reasonable hypothesis—and this is true of a defendant's negligence as it is of a plaintiff's contributory negligence. *Marty v. Erie R.R. Co.*, 163 A.2d 167.
>
> "In *Daulton v. Southern Pacific Company*, 237 F.2d 710, where there were no eye witnesses, it was held that the jury had a right to search the evidence in order to reconstruct and determine what happened. On contributory negligence, the court stated, 'surely the company, on contributory negligence is entitled to have the same rule work in its favor. . . . The lesson seems to be in *Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 100 L. Ed. 668, that a jury can choose any reasonable hypothesis and that *the rule works both ways* . . .' Under the facts in this case it is not apparent that there was *no possible basis* to find some contributory negligence. Thus, it was not a question of law for the court and the instruction should have been given." Pages 74 and 75. (The italics are ours.)

While this case was an FELA case, it does show that this court is committed to the doctrine that "what is sauce for the goose" on negligence "is sauce for the gander" on contributory negligence and that the trial court properly gave the instruction in question for the reason that there was some possible basis to find some contributory negligence.

Actually we say that the charge on contributory negligence was demanded, but all this Court has to do to uphold the trial court (by reversing the incorrect decision of the Court of Appeals for the Fifth Circuit) is to hold that the charge on contributory negligence was warranted.

Petition for Certiorari should be granted.

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CERTIFICATE.

Copies mailed to opposing counsel as per Certificate of Service on file.